

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be Argued by
GROVER R. JAMES, JR.
Buffalo, New York

75-6063

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

J. C. B. SUPER MARKETS, INC.,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, and
UNITED STATES DEPARTMENT
OF AGRICULTURE,
Defendants-Appellees.

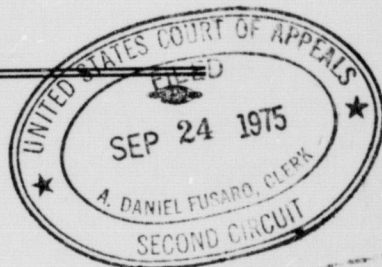
ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
NEW YORK, CIVIL ACTION No. 1970-232.

BRIEF OF APPELLANT
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United States Court of Appeals

For the Second Circuit

No. 75-6063

J. C. B. SUPER MARKETS, INC.,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, and

UNITED STATES DEPARTMENT

OF AGRICULTURE,

Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANT

J. C. B. SUPER MARKETS, INC.

Statement of the Case

Plaintiff supermarket brought this action under 7 U.S.C. § 2022 to obtain review of its disqualification from participation in the Food Stamp Program (7 U.S.C. § 2011 *et seq.*) for a period of thirty days. On December 15, 1972, the Court filed a decision and order denying defendant's motion for summary judgment (*J. C. B. Super Markets, Inc. vs. United States*, 57 F.R.D. 500 [W.D.N.Y. 1972]).

Thereafter, and on July 30th and 31st, 1973, a trial *de novo* was held before the Honorable John T. Curtin, United States District Judge for the Western District of New York, at which he reviewed the evidence presented to determine the validity of the questioned administrative action. Judge Curtin, by or-

der dated June 10, 1975, directed the entry of judgment dismissing plaintiff's complaint, thereby leaving in force the 30 day disqualification.

Statement of Facts

Plaintiff operates a supermarket at 409 Niagara Street, Buffalo, New York. The neighborhood is largely made up of three different ethnic groups - Italian, Puerto Rican and Black (Transcript, p. 235). It has the largest percentage of welfare recipients in the area (p. 237), a large percentage of whom do not read English (p. 237); and plaintiff is under substantial continuing pressure to hire people that are less than qualified (p. 237). Security guards are constantly required, both inside and outside the store (p. 239). Plaintiff employs about 85 people, with about 25 in the store at any time (p. 319), including 8 or 9 cashiers (p. 321), and has 11,000-12,000 customers a week. There is a cashier turnover of over 120% a year (p. 265).

The present owners of this supermarket acquired ownership of it on March 30, 1968 (p. 234). Following that date, the Government sent J.C.B. one warning letter on December 2, 1968 (p. 33; Exh. 11) advising plaintiff of one previous irregular food stamp transaction, and officially warning plaintiff to comply. Thereafter, and on March 25, 26 and 27, 1969, they sent one Annie Mae Crum, a Manpower worker, whom the Government had used on occasions in the past (p. 161), to shop J.C.B., and she allegedly made purchases of ineligible items with food stamps on each of those three days. On March 25 and 26, she allegedly made such purchases from a cashier, later tentatively identified as Betty Gainer, and on March 27, she allegedly made such purchases from a man who was operating a cash register, claimed to be John Cusack, the Manager. On three later dates, in April 1969, she again visited the supermarket, to see if she could purchase ineligible items

with food stamps, but the cashiers refused to permit this (p. 93, 160).

On March 26, 1969, when Annie Crum allegedly gave Betty Gainer food stamps for ineligible items, Betty Gainer told her she was not supposed to let Annie Crum have the ineligible items, but would anyway.

The Government, by letter dated May 14, 1969, charged plaintiff with three specific violations of the regulations. They concede that those are the only violations which brought about the disqualification (Answers to Interrogatories, No 1).

After charges were placed, and various administrative hearings and appeals took place, the Food Stamp Review Office eventually disqualified plaintiff from participation in the food stamp program for 30 days.

POINT I

The Government failed to sustain its burden, in this trial *de novo*, of establishing the violations charged against J.C.B. Super Markets, Inc.

The Government, in response to interrogatories served on it by plaintiff, listed the specific violations with which plaintiff was charged, as follows:

"1. On or about March 25, 1969, Betty Gainer, clerk, accepted \$6.00 in food coupons (3-\$2.00 coupons) in exchange for merchandise which included—" (6 ineligible items, etc.)

"2. On or about March 26, 1969, Betty Gainer, clerk, accepted one six-pack of —" (beer, and 6 other ineligible items)

"3. On or about March 27, 1969, John Cusack, Manager, accepted \$6.00 in food coupons (3-\$2.00 coupons) in exchange for merchandise which included —" (6 ineligible items, etc.)

These claimed violations were also set out in letter of charges served on plaintiff by the Government, pursuant to the requirements of the Food Stamp Program Regulations (7 CRF Part 1602.6). As such, they constitute the matters the Government must prove, in this trial *de novo*, if they are to sustain their burden.

The statute which plaintiff is claimed to have violated (Title 7, USC § 2020) in spelling out the prohibited sales, states: "Any approved retail food store—may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the regulations issued pursuant to this chapter—".

The applicable regulations allegedly violated are 7 C.F.R. 1600.2 (i) and 1602.2(b). Section 1600.2(i) defines "eligible food". Section 1602.2(b) provides, in substance, that coupons shall be accepted only in exchange for eligible foods, and further provides that a retailer shall not knowingly accept coupons for imported meat or meat products, and then establishes a presumption of knowledge under certain circumstances.

The statute, for all practical purposes, is a penal statute. It takes away rights, or at least privileges, which can be of crucial importance to people in the situation of plaintiff. This being so, it should be up to the Government, in simple fairness, to prove its case in each essential respect, or plaintiff should be entitled to a verdict in its favor.

The Government specifically identified the persons claimed to have conducted the illegal sales, by name: Betty Gainer and John Cusack. By doing so, they focused all of plaintiff's attention on those two people; based all their claims of violation on alleged acts of those two people, and their charges should stand or fall based on proof, or lack of proof, as to those two people.

There is absolutely no identification of the clerk Betty Gainer in this case from any source. Annie Mae Crum, the Government shopper, admittedly did not know the identity of the cashier from who she allegedly made purchases on March 25 and 26, 1969 (p. 162). She "never knew her" (p. 162); "I don't know her today" (p. 162); "I read her name" (p. 162); "But I didn't know her name before" (p. 162). The only way she knew her name at the trial was because trial counsel for the Government "or somebody else" told her (p. 163).

In the affidavits Annie Mae Crum filled out for the Government agent, Solomon Goodman, covering the shoppings of March 25 and March 26, there was no mention of the name of the cashier involved, except that someone, identity unknown, had written in the name of "Betty Gainer, clerk" between the words "I purchased the following items:", and the word "Item". That name was not written on the statements signed by Annie Mae Crum, covering the March 25th and 26th shoppings, at the time Annie Mae Crum signed them (p. 163), and she did not write the name in herself (p. 163).

The Government agent, Solomon Goodman, likewise testified that he did not add the name of Betty Gainer to the two affidavits of Annie Mae Crum (p. 110), nor did anyone in his office (p. 111).

The agent, Solomon Goodman, did not go into the store with Annie Mae Crum, so he does not know who she dealt with, or what she did in the store (p. 122). He did not first enter the supermarket himself, until some date between April 9 and April 15, 1969 (p. 115). At that time, he did not take Annie Mae Crum with him to identify who the clerk was who made the sales (p. 116). When asked how he identified Betty Gainer as the cashier (out of the 85 or so people who periodically work at the store) who allegedly made the illegal sales, he said that he did so by a description he had, and probably from a due-bill that had her initials on it, and from

a cash register number (p. 116). He testified that due-bills were given to Annie Mae Crum both on March 25 and 26. The first one, for March 25th, was lost by Annie Mae Crum (p. 119), so Mr. Goodman could not identify the cashier on the basis of that due-bill (p. 119). The second one, from March 26th, was turned over to Mr. Goodman by Annie Mae Crum (p. 120). Mr. Goodman did not produce that due-bill in Court, but apparently left it at his office in New York City (p. 120), so he had no means of identifying who the cashier was who sold that merchandise to Annie Mae Crum (p. 121). He likewise received a cash register tape, for the shopping of March 26th, and likewise failed to produce it in Court.

Mr. Goodman was not certain how he got Betty Gainer's name. He said "I believe I talked to the manager first" (p. 108). Earlier, when asked the same question, he said "Probably when I interviewed her—I have to check if she received due-bills and I would have to check that from these original statements, the due-bill has the initial or clerk's number on it" (p. 107). It was very apparent that Mr. Goodman could not recall how he went about establishing his alleged identification of Betty Gainer on these first two shoppings. Even in his write-up of the case, covering his interview with Betty Gainer, it is quite apparent that he confronted her; told her she had made illegal sales; and asked her why she did so. Most people, in that situation, face to face with authority, and told they did something improper several weeks before, of a routine nature, which they cannot possibly recall, would probably act as Betty Gainer allegedly did. Mr. Goodman has her saying "She cannot explain why she sold ineligible items—". This is not the stuff of which adequate proof is made. Judge Curtin, at the trial, kept out this testimony entirely (p. 215) and it is commented on here simply because the same information appears in the Government's answers to interrogatories, which are necessarily part of the record. Judge Curtin also stated: "I think that as far as Gainer is concerned, there seems to be a mystery of how they found out the name Gainer" (p. 216).

With respect to the alleged identification of John Cusack, the manager, with respect to the March 27th sale, the record is also completely lacking in any credible identification. Annie Mae Crum, when she made the purchase of March 27th, did not identify the person from whom she made the purchase (pp. 154, 171) either by name or by job capacity. She "did not know who he was" (p. 171). She did not know at the trial who he was (p. 171). She did not know that he was allegedly a manager, but "just thought he was a clerk" (p. 171).

In the March 27th affidavit Annie Mae Crum filled out, once again someone had filled in the name of "John Cusack", then written the word "clerk", crossed it out, and then written in the word "manager", between the words "I purchased the following items:" and the word "Item". Annie Mae Crum did not write that name in, and she had no idea who did (p. 164). Agent Goodman likewise denied writing the name John Cusack in that affidavit, and had no idea who did so (p. 110).

Agent Goodman did not enter the store with Annie Mae Crum when she allegedly made purchases from John Cusack, so once again he does not know who she dealt with (p. 122).

On the question whether the manager, John Cusack, was ever identified, either by name or by job title, Judge Curtin said "Mr. Cusack, it seemed to be a process of elimination, so substantially I could find it was Cusack because as I recall she (referring to Annie Mae Crum) said it was a man and she understood it was the manager". Actually Annie Mae Crum did not know, and never found out, who the man was from whom she allegedly purchased, so that reason for so identifying him did not exist. Mr. Goodman, early in his testimony, said "In this instance Annie Crum also had selected cigarettes which the cashier who happened to be the manager refused to sell her" (p. 12). Mr. Goodman had no basis for such a statement, and did not substantiate it, but that statement may have formed the basis for Judge Curtin's belief that he had been so identified as manager.

Agent Goodman, in his investigative write-up of these shoppings (Exh. 15, Deft.) does not indicate that John Cusack actually made a prohibited sale. His report states "He (Cusack) feels that *if* he permitted the sale of ineligibles for food stamps it was because he was careless". Again, it appears clear that Goodman confronted Cusack, many weeks after the alleged event, and alleged that he had made an illegal sale. It was obviously impossible for Cusack, at that late date, to make a categorical denial of such a sale. Again, this proof falls far short of that necessary to prove a case for the Government.

The store owner, Joseph Perna, was asked by the Government Attorney whether Cusack ever advised him that he had made the claimed illegal sale. As Mr. Perna testified (concerning Cusack) "He just shook his head and couldn't understand how it happened and he never told me that he did, in fact, do this, even though he probably believed he did."

So far as review of the record reveals, this is substantially the only proof in this case identifying either Petty Gainer or John Cusack. It is respectfully submitted that this proof is not enough.

There were a couple of very simple ways for the Government to prove the identity of the people from whom the purchases were made. One was to save the due-bills which allegedly had the names or initials of the cashier involved, and produce them in Court. The other was to save the cashier's tape, which showed the aisle, the register number, and, with a little digging, the cashier involved, and produce them in Court. The Government failed to do this, but left them in New York during the trial (p. 120). This made it impossible for them to buttress their proof of identity, and also made it impossible for plaintiff to use these documents to discredit any other alleged proof.

The Government had the means available of proving the specific charges. Clearly, they failed to do so. Plaintiff should not be asked to bear the burden of that failure.

POINT II

Plaintiff may not be charged with any alleged sales made by Betty Gainer in direct violation of specific orders especially when notice of such orders was communicated to the Government before the sale was consummated.

The Government in these two charged illegal sales seeks to impute to J.C.B. the alleged acts of its cashier, Betty Gainer, on March 25 and 26, of accepting food stamps for ineligible items, on the theory that she was acting as an authorized agent of J.C.B. at the time of these transactions. It is the position of plaintiff, J.C.B. Super Markets, Inc., that Miss Gainer's alleged conduct cannot be considered the actions of J.C.B., and are not binding on J.C.B. under the facts of this case.

Miss Crum testified that on March 26, when she presented food stamps for her purchase, the clerk, allegedly Betty Gainer, told her that she was not permitted to let her purchase ineligible items with food stamps, but she would let her have them anyways (pp. 148, 169-170).

"She says she is not supposed to let me have these items, meaning the beer and the detergent, the ineligible items, but she would let me have them that day" (p. 148)

Again, on cross-examination, Miss Crum was asked: *"She (Miss Gainer) was telling you in effect that she had been instructed by her management not to sell that kind of item for food stamps but that she was going to do it anyway?"*

"A. Yes, the second day" (pp. 169-170).

In Miss Crum's write-up of the shopping on March 26, 1969, she said, quoting Miss Gainer "*I was not allowed to have any taxable items for food stamps, but she would let me have it this time*". (p. 170).

Miss Crum was then asked: "Although she (Miss Gainer) *knew it was improper and she had been told not to do it*, she was going to go ahead and do it for you, is that right?"

A. "Yes" (p. 170).

Although Miss Gainer did not make a similar statement on March 25, it would seem clear that such testimony reflected her state of mind on that prior day as well.

The clear import of this testimony is that she knew that her conduct was unauthorized, and against her employer's specific instructions. Equally clear is that Miss Gainer's purpose was most certainly not to benefit her employer, by these alleged sales, as he obviously was aware that her conduct could jeopardize J.C.B.'s continued participation in the food stamp program, and could even jeopardize its continued existence (p. 323). Her purpose, in fact, was simply personal. Her intent to serve a personal end for the time being completely superseded any thought of serving her employer. True, by her acceptance of the food stamps for ineligible items, she helped J.C.B. net a few cents profit on a sales transaction which might or might not otherwise have taken place. Miss Gainer, however, never asked Annie Mae Crum whether she had money for the ineligible items, a failure which certainly indicates that at that time she was merely desirous of letting Miss Crum, for Miss Crum's own personal advantage, use the food stamps, and that she was unconcerned about lost sales.

The issue, therefore, is whether a corporate employer may be held liable for the violation of the Food Stamp Act by an employee when that employee was not really working for the benefit of, or advancing the interests of, her employer. Since there is no authority precisely on point, general principles of

corporate responsibility regarding the imputation of an agent's/servant's actions to a corporation where he was advancing his own rather than the corporation's interest, should control.

The purpose to benefit the corporation, it is frequently stated, is necessary to equate an agent's/servant's criminal or otherwise unlawful conduct, with that of the corporation in criminal cases or cases having some punitive consequences. *Standard Oil Company of Texas vs. United States*, 307 F.2d 120, 128-129 (5th Cir. 1962); *National Labor Relations Board vs. Glenn Martin-Nebraska Co.*, 141 F.2d 371, 373 (8th Cir. 1944), cert. denied, 320 U.S. 788; *Egan v. United States*, 137 F.2d 369, 379 (8th Cir. 1943); Re-statement of the Law of Agency (2d) § 217D, comment d; Mechen, Agency (1952 ed.), § 367. It is an elementary principle of agency that "an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed". Restatement of the Law of Agency (2d) § 235; and see especially comment 2 to § 235.

There is, however, a limited exception to this rule. In civil actions to recover actual damages for an agent's/servant's misrepresentation done without intent to benefit his employer, it is well established that liability will nevertheless be imposed upon the employer, in a situation where a third person would otherwise be hurt. *Gleason v. Seaboard Airline*, 278 U.S. 349 (1929), *United States v. Ridgelea State Bank*, 357 F.2d 495, 498-499 (5th Cir. 1966); Restatement of the Law of Agency (2d) § 257 and comment d; Mechem, Agency (1962 ed.) §§ 131-135. The underlying rationale for this exception to the rule applying to criminal conduct is that a third person has suffered loss which the employer is better able to bear and spread than is his agent/servant. *United States v. Ridgelea State Bank*, *supra*, at p. 499. Criminal cases, on the other hand, require a different rule because the policy of fair loss allocation is not present and the possibility of imprisonment serves as a deterrent to employees. *Id.*

In the instant case, we do not have a situation in which an innocent third party seeks to redress a tort caused by Miss Gainer's wrongful misrepresentation. Although the penalty of suspension is a civil sanction, it certainly bears a close resemblance to criminal liability, for its purpose is not for the recovery of a loss caused by an agent/servant, but rather to punish and deter wrongful conduct, and its sanction has rather severe *penal* consequences. Moreover, it should also be noted that criminal sanctions against wrongdoing employees exist which will tend to deter repetition of their conduct. 7 U.S.C. § 2023(b). Because of these factors, the instant action is sharply distinguishable from the ordinary civil case of misrepresentation in which an agent's/servant's self-serving conduct is chargeable to his corporate employer. Consequently, this action requires the application of the general rule recognized in criminal actions or cases having some punitive consequences that an employer may not be penalized for an agent's/servant's conduct in violation of a federal statute if he acted for some purpose other than that of serving his employer. *Asphalt Industries v. Commissioner*, 384 F.2d 229, 234-235 (3rd Cir. 1967); *United States v. Ridgelea State Bank*, *supra*, at 499-500; *National Labor Relations Board v. Glenn Martin-Nebraska Co.*, *supra*. The Glenn Martin case is especially pertinent for there the Eighth Circuit recognized the validity of this rule concerning an employee's violation of the National Labor Relations Act, an act which is analogous to the Food Stamp Act in that both are regulatory statutes defining certain conduct as *malum prohibitum*.

Accordingly, J.C.B. should not be chargeable with Miss Gainer's alleged conduct on March 25 and 26 and Judge Curtin's finding of violations by J.C.B. stemming from those actions should be reversed. This is all the more so since Betty Gainer's alleged acts represent wilful violations on her part, over which her employer could not possibly have any control.

This is not merely a situation where a store employee acted in violation of specific instructions. Instead, it is a situation where, before the sale was made, the Government itself *knew* that the cashier had no authority to make such a sale; had been so advised by the cashier herself, and then still persisted in making the sale.

It is a general rule that knowledge of an agent (Annie Mae Crum) acquired in the performance of his or her duties will be imputed to the principal (the Government). *Ritchie Grocer Company v. Aetna Casualty & Surety Company*, 426 F.2d 499 (8th Cir. 1970). Notice acquired by an agent in the transaction of the business of his principal is notice to the principal. *Schram v. Burt*, 111 F.2d 557 (6th Cir. 1940). Accordingly, it follows that the Government itself knew, before the purchases were made, that the cashier was under specific orders not to make them.

To the Government's express knowledge, Betty Gainer clearly had neither express authority, implied authority, or apparent authority to make these sales. The Government may not now claim that plaintiff, by permitting its cashier to handle sales and deal in food stamps, had created apparent authority in her to make illegal sales for food stamps, in the face of their specific knowledge that there was no such authority in fact.

POINT III

The disqualification imposed by the Government, and concurred in by Judge Curtin, was not appropriate under the circumstances in this case.

Judge Curtin previously held, in construing the Food Stamp Act, that it was his duty to make his own findings of fact based upon a preponderance of the evidence before him with

respect to the question of whether the alleged violations were committed. *J.C.B. Super Markets, Inc. v. United States*, 57 F.R.D. 500 (W.D.N.Y., 1972). Implicit in this statement of the Court's task was a recognition that it was very possible that some or all of the charged violations would not be sustained. Since it would appear to be improper for the sanction meted out by the Administrative Agency in such a situation to remain unchanged, it necessarily follows that the sanction should be redetermined in the light of the charges, if any, that have been sustained. Judge Curtin has now held that he may make his own independent judgment as to the term of disqualification (p. 11 of Order).

Section 2022 provides in pertinent part that upon a trial *de novo*, "If the Court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence." There can be no doubt that this statutory language authorizes this Court to impose a different sanction, or no sanction at all, based upon the evidence adduced at the trial.

Accordingly, if this Court finds that the Government has failed to establish some or all of the alleged violations, this Court may determine a new sanction or that no sanction is called for, based upon the evidence adduced at the trial.

Once the principle is established that the Court may impose a new sanction, the principle remains valid whether the Court makes new findings, or makes the same findings as did the Administrative Agency. Having the power to impose a new sanction, the Court may do so independently of the Administrative Agency.

This Court must necessarily have the power to reach a different result than that reached by the Administrative Agency, or by Judge Curtin, whether it makes different findings with respect to specific claimed violations, or whether it makes different findings with respect to other aspects of the

litigation. In this case, the Administrative Agency did not have before it any substantial testimony as to the dire economic and other effects upon J.C.B. and Mr. Perna, its President, of a 30 day suspension. This Court may well find, as testified to by Mr. Perna, that a 30 day suspension might result in his being unable to continue operating this store. The Court might well find, in addition, that the traumatic effects of such a closing on Mr. Perna himself is a substantial factor to be considered (p. 323). The Court might further feel it appropriate to give due consideration to the effects upon the customers served by Mr. Perna's store if such a 30 day suspension is upheld (p. 326).

There is testimony in this case, which was likewise before the Administrative Agency, to the effect that the present management of J.C.B. received only one visit, which resulted in one warning letter, before the Government started its official investigation which resulted in the present 30 day suspension. Quite clearly, this is not normal practice on the part of the Government, and quite clearly, should not form the basis for the dire consequences which have resulted.

If the Government had given the present management of J.C.B. all of the prior warnings which it apparently thought had been transmitted to J.C.B., this present suspension, and the present litigation, would never have arisen. Mr. Perna would certainly have taken appropriate steps to bring his store in line, promptly and without any further problems.

Conclusion.

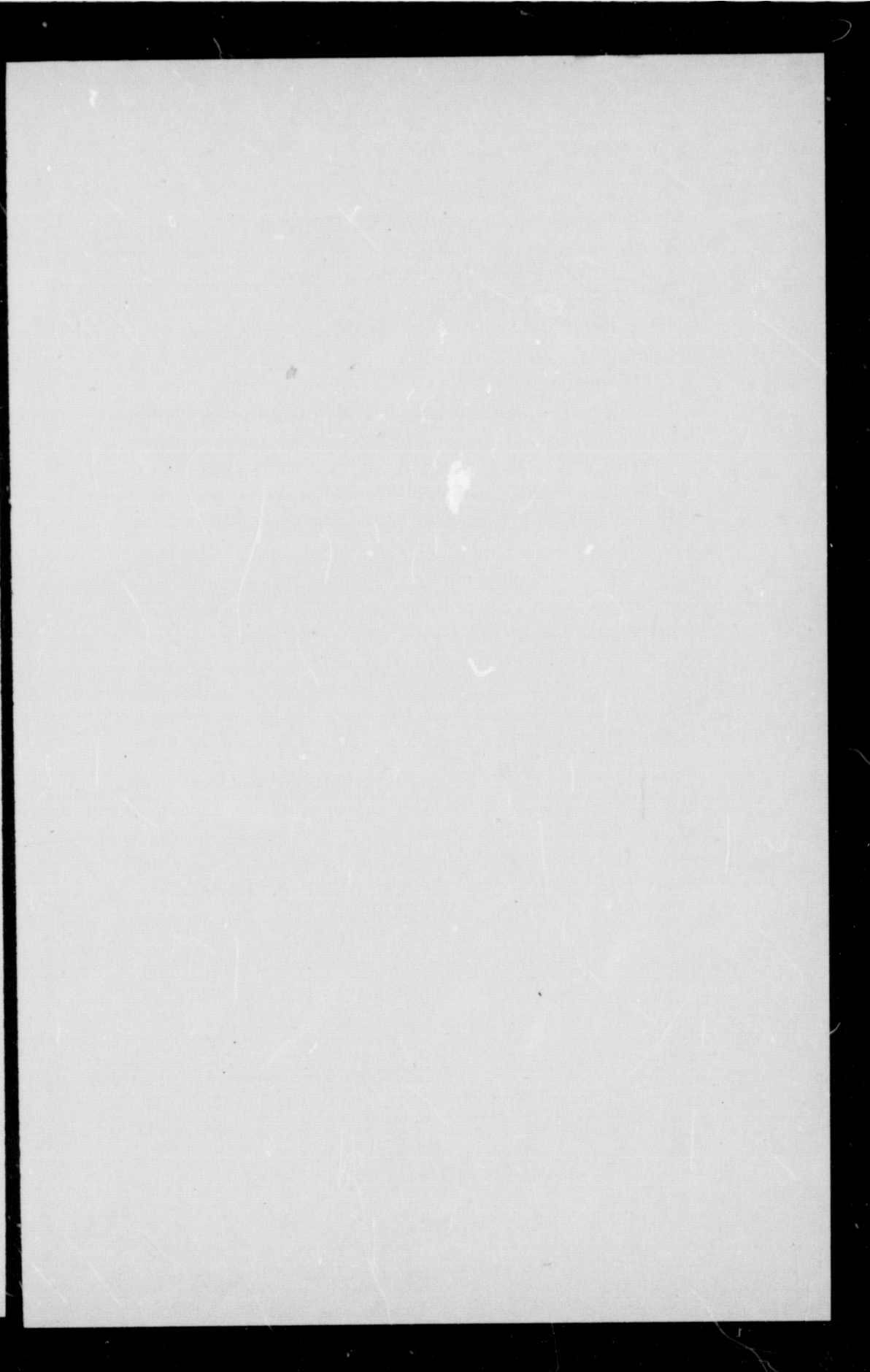
For all the foregoing reasons, the order and judgment of the District Court appealed from should be reversed, and the relief requested by plaintiff should be granted.

Dated: September 18, 1975.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York) RE: J. C. B. Super Markets, Inc.
County of Genesee) ss.: v
City of Batavia) U. S. A. & U. S. Department of
Agriculture
Docket No. 75-6063

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and an employee of the Batavia Times Publishing
Company, Batavia, New York.

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Richard J. Arcara
U. S. Attorney
Western District of New York
United States Court House
Buffalo, New York 14202

Attention: Theodore J. Burns
Asst. U. S. Attorney
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about 4:00 P.M. on said date at the request of:

Grover R. James, Jr., Esq.
1800 One M & T Building, Buffalo, New York 14203

Leslie R. Johnson

Sworn to before me this

23 day of September, 19 75

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977

